Abdul Muthalib bin Hassan v Maimoon bte Haji Abd Wahid

HIGH COURT (KUANTAN) — CIVIL SUIT NO 24-262 OF 1986
LAMIN J
27 SEPTEMBER 1991

Tort *— Damages — Trespass — Measure of damages — Nominal damages — Landlord unlawfully repossessing property from tenant following notice to tenant — Technical error in notice — Conduct of parties — Plaintiff's unwarranted attitude*

Landlord and Tenant *— Monthly tenancy — Notice to quit — One calendar month's notice not given — Whether notice valid*

Tort *— Detinue and conversion — Elements of action — No specific demand for return of goods — Conditional refusal to return goods — Whether cause of action in detinue or conversion exists*

Tort *— Trespass to property — Landlord repossessing property from tenant following notice to tenant — Technical error in notice — Whether trespass committed by landlord*

The plaintiff was the tenant of certain premises of which the defendant's father was the owner. Following the death of the owner, the plaintiff continued paying rent to the defendant. The rent was to be paid on the first day of each month. The defendant later gave a one-month notice dated 8 January 1986 to the plaintiff to quit the premises by 22 January 1986 on the ground that the plaintiff had rented out the premises to another person without the defendant's consent. On 27 January 1986, the defendant locked up the premises and later said through her solicitors that the plaintiff was free to take his goods remaining on the premises provided that he paid all arrears of rent due. The plaintiff brought an action claiming an order for the return of his goods and damages for trespass against the premises.

Held, allowing the plaintiff's claim:

(1) The plaintiff was a monthly tenant on the basis of the calendar month. On the evidence the deffendant's notice to quit was not a valid notice.

(2) There was no unconditional and specific demand by the plaintiff for the return of his property. Even assuming that there was a demand for the return of the plaintiff's goods, the defendant had stated a conditional refusal to return them. There was therefore no cause of action either in detinue or for conversion pertaining to the plaintiff's belongings.

(3) As the notice to quit was not valid, the plaintiff therefore still had the right to exclusive possession of the premises. The defendant's action in locking up the premises must amount to trespass. The non-payment of rent was no justification for the trespass. It may mitigate damages.

(4) Only nominal damages ought to be awarded for the trespass. The defendant had committed only a technical error as regards the notice. She could very well have recovered the premises if the notice had been in order. She had locked the premises perhaps with the hope that the plaintiff would pay the arrears of rent. The plaintiff did not make an attempt to regain possession of the premises. As regards his goods, he never made any offer to settle whatever rental that was truly due.

[Bahasa Malaysia summary

Plaintiff adalah penyewa suatu premis tertentu yang dipunyai oleh bapa defendan. Berikutan dengan kematian tuanpunya, plaintif terus membayar sewa kepada defendan. Sewa patut dibayar pada hari pertama setiap bulan. Defendan kemudiannya memberi notis sebulan bertarikh 8 Januari 1986 kepada plaintif untuk meninggalkan premis itu sebelum 22 Januari 1986 atas alasan bahawa plaintif telah menyewa premis itu kepada orang lain tanpa keizinan defendan. Pada 27 Januari 1986, defendan telah mengunci premis itu dan selepas itu, menerusi peguamnya, mengatakan bahawa plaintif bebas mengambil barangannya yang tertinggal di dalam premis itu asalkan beliau membayar semua tunggakan sewa yang kena dibayar. Plaintif telah membawa satu tindakan untuk menuntut satu pertintah bagi pemulangan barangannya dan ganti rugi untuk pencerobohan terhadap premis itu.

Diputuskan, membenarkan tuntutan plaintif itu:

(1) Plaintif adalah seorang penyewa bulanan mengikut bulan takwim. Atas keterangan, notis penamatan defendan itu bukanlah notis yang sah.

(2) Tidak ada tuntutan tak bersyarat dan tentu oleh plaintif bagi pemulangan hartanya. Meskipun anggapan dibuat bahawa ada tuntutan bagi pemulangan barangan plaintif, defendan telah menyatakan suatu keengganan bersyarat memulangkan barangan itu. Jadi tidak ada kausa tindakan sama ada dalam detinu atau konversi berkenaan dengan barangan plaintif.

(3) Oleh kerana notis penamatan itu tidak sah, plaintif masih mempunyai hak pemilikan eksklusif premis itu. Tindakan defendan mengunci premis itu sudah tuntunya merupakan pencerobohan. Tiadanya bayaran sewa bukanlah alasan bagi pencerobohan. Ia mungkin mengurangkan ganti rugi.

(4) Cuma ganti rugi nominal harus di berikan kerana pencerobohan. Defendan telah melakukan sutu kesilapan teknikal tentang notis itu. Beliau boleh mendapat balik premis itu jika notis it teratur. Beliau telah mengunci premis itu mungkin dengan harapan bahawa plaintif akan membayar tunggakan sewa. Plaintif tidak membuat percubaan untul mendapat balik pemilikan premis itu. Tentang barangnnya, beliau tidak sekali-kali membuat sebarang tawaran untuk menyelesaikan apa-apa sewa yang benar-benar kena dibayar.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–472–1991.]

Case referred to

1 *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314; [1963] 1 WLR 644 (folld)

Legislation referred to

Specific Relief Act 1950 s 9
Torts (Interference with Goods) Act 1977 [UK] s 3

Bastian P Vendargon (*Vendargon & Partners*) for the plaintiff.
Chua Ah Cho (*Sahadin & Co*) for the defendant.

Lamin J: In this case the plaintiff (PW1) is suing the defendant (DW1) for the return of all his belongings wrongfully detained by the defendant at the business premises No 52 Batu 8 3/4, Jalan Gambang, Kuantan known as Restoran Haji Abdul Wahid. The owner of the premises was one named Hj Abdul Wahid, now deceased, the father of the defendant. According to the plaintiff (PW1), he became the tenant of the said premises by way of an oral agreement with effect from 20 August 1977 for the purpose of carrying on the business of 'Kedai Kopi dan Makanan'. (The business was registered on 31 May 1979 — see P4.) When he started the business the rental was $70 per month. It was increased to $100 per month in 1978 and $150 per month in 1980 and finally in 1984 to $200 per month. He had been paying the rent to the late Hj Abdul Wahid until his death in June 1984. Thereafter he continued paying the rent to his daughter, the defendant. The rent was to be paid on the first of every month.

As from 1 June 1985 PW1 was not in good health and so on 10 June 1985 he leased out his business to one Abu Bakar for one year at a monthly rental of $450. About that time, PW1 stayed in Penang for treatment. The rental of $450 must have been for both the business and the premises. However by a notice dated 28 December 1985 (P3), PW1 terminated the said agreement on the grounds that Abu Bakar had defaulted in the payment of rental and committed some other breaches as well. So on 3 January 1985 Abu Bakar surrendered both the business and the premises to PW1.

In the meantime, the defendant (DW1) served PW1 with a written notice dated 8 January 1986 (P6) to vacate the said premises within one month on the ground that PW1 had rented out the premises to Abu Bakar without her consent. On 27 January 1985 the premises were closed and padlocked allegedly by DW1. Hence the present suit filed by PW1.

Having carefully considered all the evidence before me I agree with learned counsel for the plaintiff that the entire case hinges on the question of the validity or otherwise of the notice to quit (P6). I also agree that on the evidence PW1 was a monthly tenant on the basis of the calendar month and accordingly therefore the said notice was not a valid notice.

The next thing for me to decide is who locked the premises. According to PW2 (Mohamad Mydin) it was the defendant (DW1) who locked it. At about 6.30am on 27 January 1986, the defendant came to the shop and

PW2 (PW1's employee) was there alone and was about to open the shop when the defendant told PW2 that she and PW1 'ada hal' and so she wanted to lock the shop. She then locked it using her own padlock. DW1, however, denied going to the shop on the said date and denied locking it. According to DW1, on the day before (ie 26 January 1986), PW2 informed her that he wanted to leave the premises in the morning of the next day and asked her for a lock. She did not know why he wanted to leave. But from her solicitor's letter of 14 June 1986 (see p 22 of agreed bundle — P13), she categorically denied having 'forcibly and unlawfully locked' the shop. According to the letter, Mydin (PW2) left the premises unattended and she had no alternative but to lock the premises. Now, from PW2's version, when DW1 wanted to lock it, he asked her to wait for the return of PW1's son named Abd Rahim but DW1 refused to listen. So PW2 packed his clothes and waited in the shop next door for the return of Abd Rahim. According to PW2 Abd Rahim returned that same evening and PW2 informed him of the incident and reported the matter to the police. It is interesting to note that neither Abd Rahim testified in support nor the police report produced. In examination-in-chief PW2 said that after that (meaning after informing PW1's son and the lodging of the police report) PW1's son (Abd Rahim) was not allowed into the shop. In cross-examination PW2 said that he did not know whether PW1's son had gone to see DW1. Also in cross-examination, PW2 said that he did not telephone PW1's son nor PW1 himself ie regarding the incident after he had been locked out. It is amazing that PW2 merely waited from 6.30am till evening without doing anything about the incident. In examination-in-chief, PW2 was positive that PW1's son was not allowed into the shop suggesting that since the shop had been locked in his absence, he must have made an attempt to see DW1 in order to get into the shop and yet in his cross-examination he said that he did not know whether PW1's son had gone to see DW1. On the other hand when DW1 was cross-examined on her solicitor's letter of 14 June 1986, her reply was that she did not know how to answer the question as to why she changed her story. During the whole time PW1, PW2 and DW1 were in the witness stand, I had the suspicion that the whole truth was not before the court though everyone of them swore to state the whole truth and nothing but the truth. However, the sum toto of the evidence suggests that DW1 must have locked the premises and that seems to be the more probable version. The next question is what was the reason for locking the shop. Was it because PW2 had left it unattended or that she locked it after having chased PW2 out of it? One would expect the latter to have taken place and I think so too as there was a ready-made motive for the act. That was wrongful as the plaintiff was still legally in possession, because the notice to quit was not a valid notice.

The first prayer of the plaintiff's claim is for the return of all his belongings wrongfully detained by the defendant. I think the set of facts before me does reflect the English law of detinue, possession and conversion. On detinue if I may quote *Clerk & Lindsell on Torts* (13th Ed) at p 636 para 1072:

> The gist of liability in detinue is the wrongful detention of the plaintiff's chattel. The action was available against a defendant who had received the chattel from

the plaintiff (eg by bailment) or otherwise against a defendant who withheld the plaintiff's chattel after the plaintiff had demanded its return. The principal object of the action was to recover the value of the chattel so detained.

In the case of *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd*,[1] Diplock LJ in the Court of Appeal explained the law of detinue and conversion thus (at p 317):

> This appeal raises a neat point as to the remedies available to a plaintiff who sues for the wrongful detention of goods. The plaintiffs by a specially indorsed writ claimed 'the return of a mobile crane index No OMF 347 or its value and damages for detaining the same'. They pleaded their title to the crane and relied on a demand for its delivery up dated 8 May 1961. The prayer included an alternative claim for damages for conversion.
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> There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession. Thus, if there had been an actual bailment of the chattel by the plaintiff to the defendant the latter was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up and the plaintiff could sue in detinue notwithstanding that the defendant was not in actual possession of the chattel at the time of the demand (see *Jones v Dowle* (1841) 9 M & W 19; *Reeve v Palmer* (1858) 5 CBNS 84). Alternatively the plaintiff could sue in conversion for the actual wrongful delivery of the chattel to the third person, though not for its loss. On the other hand an unqualified refusal to comply with a demand for delivery up of a chattel made by the person entitled to possession may also amount to conversion, but only if the defendant at the time of the refusal was in actual possession of the chattel. If he has wrongfully delivered it to a third person before the date of the demand the prior wrongful delivery constitutes the conversion, not the subsequent refusal to comply with the demand (see *Sachs v Miklos* [1948] 1 All ER 67 at pa 68; [1948] 2 KB 23 at p 29). But even where, as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based on the refusal to comply with that demand, he has a right to elect which cause of action he will pursue (see *Rosenthal v Alderton & Sons Ltd* [1946] 1 All ER 583 at p 585; [1946] 1 KB 374 at p 379) and the remedies available to him will differ according to his election.

Clerk & Lindsell at p 645 para 1091 states:

> The ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant, having it in his possession, refused to give it up on demand made by the party entitled.

The demand must be unconditional and specific. So also the refusal to return the plaintiff's property must be equally unconditional. Logically therefore the right of action will only be available if the demand is made before the issue of the writ. *Clerk & Lindsell* at p 646 (para 1094) states: 'There can be no right of action unless the demand was brought to the knowledge of the defendant before the issue of the writ.'

Detinue has been abolished in England but the remedies for conversion are now found in s 3 of the Torts (Interference with Goods) Act 1977 which is modelled on the common law remedies available for detinue (see *Winfield and Jolowicz on Tort* by WVH Rogers (12th Ed) p 501). Section 9 of our Specific Relief Act 1950 states:

> A person entitled to the possession of specific movable property may recover the same in the manner prescribed by the law relating to civil procedure.
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> ...
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> Explanation 2 — A special or temporary right to the present possession of property is sufficient to support a suit under this action.

According to Explanation 2, a special or temporary right to possession is sufficient to support a suit. But in England before and after 1977 the right to sue will only arise after a proper demand is made. In our s 9 of the Specific Relief Act 1950, the words 'entitled' and 'right' are used and they must mean legally 'entitled to possession' or 'right to possession' and I think before that legal right can arise, something must first be present. For example, if someone is in more physical possession of some moveable object, he may bona fide continue to be in possession of it if no one demands the return of it. Only with the demand made, will the person in possession be aware of or realize the right to possession in the person who makes the demand. Once he is aware that another person has a better right to possession, he may decide to return the property forthwith in which case there will be no case against him and no writ need be issued. Similarly therefore in our case an unconditional letter of demand for the return of the goods should also issue before the writ is filed. In the present case before me the plaintiff was back in possession of the premises on 3 January 1986 ie the day when Abu Bakar returned the premises upon termination of the tenancy by the plaintiff. The plaintiff appointed PW2 to look after the shop with his son as PW2's assistant. On 27 January 1986 the defendant (DW1) locked the premises. Now the question is whether there was any demand made by the plaintiff for the return of any specific things belonging to him, assuming that the defendant was then in possession. I find no unconditional and specific demand by the plaintiff for the return of his property. The earliest indication from PW1 after 27 January 1986 which made reference to his own goods in the premises is contained in the letter of the plaintiff's solicitors dated 28 February 1986 (P11). This letter did not demand for the return of his goods. It merely informed the defendant that she would be held for 'all loss and damage to his goods and property' and that legal proceedings would be instituted against him. So also was the tenor of the plaintiff's solicitor's letter of 31 May 1986 (P12). There was no specific demand for the return of his goods. The response to P12 was the letter from the defendant's solicitor dated 14 June 1986 (P13). Paragraph 3 of this

letter is of particular significance and it says: 'Your client is free to take his equipment and articles provided that he pays all arrears of rental amounting to ...'. By the abovesaid paragraph, the defendant cannot be said to have refused to return the plaintiff's goods even assuming that there was a demand for their return. I would say that it was a conditional refusal in that the condition was the settlement of all rents in arrears. Again by the plaintiff's solicitor's letter of 7 July 1986 (P14), it was not a demand for the return of the goods locked in the premises. It was merely an intimation of additional claims by adding more items. The letter of 7 July 1986 appears to be the last from the plaintiff's solicitors before the filing of the writ on 28 July 1986.

Upon perusal of the statement of claim, I find no indication of any demand made for delivery up of specific items of belongings unlike in the case of *General Finance v Cooks Cars*.[1] Neither is there an allegation of an unqualified refusal to comply with the demand for the delivery up of any specific items of belongings.

In the circumstances there was no cause of action by the plaintiff and therefore the action either in detinue or for conversion pertaining to items of the plaintiff's belongings must fail.

The next question is whether there is a case for trespass against the premises of which the plaintiff is the tenant. This is a rather unique case of trespass ie trespass is alleged to have been committed by the owner of the premises herself. The notice to quit served by the defendant, as I have found is not valid, the plaintiff therefore still had exclusive possession of the premises. Trespass can exist even with the slightest or most trifle encroachment on the property. Therefore going on to the premises and locking it must amount to trespass. Locking up the premises for non-payment of rent is no justification for trespass. It may mitigate damages.

With regard to damages, I am inclined to give only nominal damages for the following reasons. I am not going into the question of whether or not the defendant is the owner of the premises. The plaintiff has been paying rent to the defendant since the death of her father in June 1984. For the purpose of the present case, the question of ownership is no more an issue. She, the defendant, gave the plaintiff one month notice to quit the premises by 22 January 1986. Unfortunately, she committed only a technical error as regards the date of the notice and therefore it had to be ruled that it was not valid. She could very well have recovered the premises if the notice had been in order. Then she locked the premises perhaps with the hope that the plaintiff would settle the arrears of rent. Her counsel said that the plaintiff was free to take his equipment and articles. It would appear that she had no intention to commit trespass if only the plaintiff was prepared to pay the arrears. After the notice to quit had been served on him and the premises locked, the plaintiff did nothing. He could have made an attempt to regain entry and possession of the premises. As regards his goods, he never made any demand for their return and as regards the premises, he never made any offer to settle whatever rental that was truly due. I strongly feel that if the plaintiff had taken initiatives to negotiate for a settlement, this case would not have come to court. Instead his reply (ABD–8) to the notice (P6) to vacate can be said to be quite arrogant. He even questioned the defendant

as to the true ownership of the shop. He failed to realize that he had been paying rent to her since her father's death. If he had not adopted such an unwarranted attitude, in all probability there would have been settlement out of court. Within six months from the date the shop was locked, the writ was filed and the plaintiff just sat back, as if completely unconcerned as to what was going to happen to his own goods in the shop.

As I have found that trespass has been committed by the defendant for locking the shop, to allow damages to be awarded on the basis of rental of $200 per month commencing from the day the shop was locked to the day judgment is obtained is to my mind unconscionable in view of the attitude of the plaintiff. I would therefore allow only nominal damages based on rental of $200 per month for six (6) months which in effect is the period calculated from the day the shop was locked to the filing of the writ. That will be $1,200.

Decision

The plaintiff's claim is allowed and I therefore order that:

(a) nominal damages of $1,200 be paid to the plaintiff for trespass on the premises;
(b) the immediate return of the premises to the plaintiff together with his belongings; and
(c) costs.

I also find that the defendant has not succeeded in her counterclaims and they are therefore dismissed with costs.

Plaintiff's claim allowed.

Reported by PS Ranjan